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Nos. 05-908 and 05-915

IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF THE SWANN FELLOWSHIP, FORMER SCHOOL BOARD MEMBERS, PARENTS AND CHILDREN FROM THE CHARLOTTE-MECKLENBURG SCHOOLS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici are local school board officials, involved citizens, students and parents in Charlotte, North Carolina who have directly experienced, over the past 40 years, the successive consequences of *de jure* segregation, court-ordered desegregation, and "post-unitary" re-segregation of a major school system.[1]

The Swann Fellowship is a non-profit organization, formed by religious congregations in 1997. Its mission is to be a witness to the value of diversity and to challenge the people of Charlotte-Mecklenburg to demand, sustain and participate in a quality, equitable, integrated public school system. The Swann Fellowship provides forums for community dialogue about diversity, excellence and equity in education. It has a significant interest in ensuring that school boards have the discretion to use all reasonable measures to achieve integrated schools, including taking race into account in student assignment plans.

Amici Sarah Stevenson, Arthur Griffin, and Louise Woods are former members of the Charlotte-Mecklenburg Board of Education. Ms. Stevenson, elected in 1980 and re-elected in 1984, was the third African American ever elected to serve on the school board. Previously Ms. Stevenson had served as the district's first African-American president of the integrated Council of PTAs. Mr. Griffin was elected to three terms on the school board, serving from 1988 until 2003, from 1999 to 2003 as the board's Chairperson. Ms. Woods, who is white, served three terms on the school board, from 1995 until 2005. These *amici* have a

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[1] All parties have granted blanket consent to the filing of briefs *amicus curiae* by letters of consent on file with the Court. Pursuant to Rule 37.6, counsel represent that this brief was not authored in whole or in part by counsel for a party. No person or entity other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of the brief.

longstanding interest in promoting the quality of public education in Charlotte-Mecklenburg Schools (hereinafter "CMS") and in safeguarding the capacity of school boards to implement policies responsive to the needs of students, families and communities.

Amici Clifton Jones, Clifton Matthew Jones, Donna Jenkins Dawson, Neisha Dawson, Tyler Hough-Jenkins, Denise H. Jordan, Shaundra Jordan, Burrell Jordan, Terry Belk, Kimberly Smith, Susan Strong, Tracey Strong and Ashley Strong are students who now attend CMS schools, and their parents. The children have an immediate interest in an equal opportunity to a sound, basic education. That interest has been denied in the past seven years, and these *amici* have consequently intervened as plaintiffs in an educational adequacy lawsuit filed against CMS.

Amici also have an interest in being able to attend public schools that enroll students of racially diverse backgrounds so that students of all races can avoid the negative consequences of racially isolated schools and can receive the benefits of racially integrated schools. *Amici* assert that we will forestall, not promote, the realization of "one nation" tomorrow by refusing to recognize the salience of race in our nation and in the lives of our citizens today. The Court should not take from school boards all power to consider race in a carefully implemented and narrowly tailored program that democratically controlled school boards may seek to implement.

SUMMARY OF ARGUMENT

It is important to individuals and to society as a whole that children are taught how to interact with people of different racial backgrounds. Only a select few attend elite universities, while the majority of citizens attend public elementary and secondary schools. Since those schools are the only educational experience for those who do not attend

college, and the place where students spend their formative years, districts such as those in Seattle and Jefferson County have a compelling interest in promoting racial diversity in their schools.

Moreover, districts that maintain racially isolated schools lose public support because parents believe that they are in battle against each other for the best schools and the most resources. School districts need local public support to continue receiving the funding they need. They have a compelling interest in adopting school assignment policies that foster integrated schools in order to maintain strong and unified public support for the school system.

The experience of the Charlotte community demonstrates that racially diverse public schools promote social cohesion. That benefit can quickly be lost when schools resegregate. After litigation eventually required the integration of CMS, the schools enjoyed high levels of community participation and vigorous public support. Students have articulated the many benefits they enjoyed by attending school with children from different racial backgrounds.

However, once CMS decided to implement an assignment plan that did not take into account in any fashion whatsoever the racial demographics of its schools, the number of racially isolated schools in the system increased dramatically. At the same time, public support for the school system significantly declined. Despite an "equity plus" plan to improve the lowest performing schools, the most racially isolated black schools are perceived as inferior, while the nearly all-white schools in the suburbs are the most highly sought after and perceived to be the best schools.

This Court previously held in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) that school districts may voluntarily decide that in order to prepare students to live in a pluralistic society they must provide racially diverse educational opportunities. School

boards around the country have relied on that holding to fashion voluntary school assignment plans that seek to accomplish a mix of goals, including racially integrated schools. Principles of *stare decisis* are applicable here. The promise of *Swann* should not be abandoned.

The CMS experience also vividly demonstrates that race-neutral policies cannot, in many circumstances, avoid racially isolated schools and do not achieve the benefits of integrated schools. Many of the interventions designed to help failing schools were implemented by CMS when it abandoned all consideration of race in its student assignment policies. Nevertheless, the schools quickly resegregated and goals for reducing the achievement gap between white and black students were not met. Seattle and Jefferson County schools are wise to conclude that race-neutral alternatives will not result in racially diverse schools. Their limited use of race in making school assignment decisions is well-justified by the compelling governmental interests in fostering social cohesion and support for public education, and it is narrowly tailored to achieve that interest because race-neutral alternatives will not succeed.

ARGUMENT

I. SCHOOL DISTRICTS HAVE A COMPELLING INTEREST IN PROMOTING RACIAL DIVERSITY IN K-12 EDUCATION

In 1954 this Court recognized that "separate educational facilities are inherently unequal." *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). In 2003, the Court concluded that American colleges and universities have a compelling governmental interest in promoting racial diversity. Public colleges that enroll a "broadly diverse" class—including students who are racially diverse—offer their students the "substantial" benefits of "cross racial

understanding," and better preparation to work and live in "an increasingly diverse workforce and society." *Grutter v. Bollinger*, 539 U.S. 306, 330-332 (2003) (citations omitted). The dangers of racially isolated, separate schools are still real and the benefits of racially diverse schools are not limited to higher education.

Hence, our nation's public elementary and secondary schools continue to have a compelling interest in promoting racial diversity. For many students, such public schools are their only opportunity to learn the skills necessary to be effective in racially diverse settings. In North Carolina, only 41 of every 100 ninth graders will attend college immediately after high school. Nat'l Ctr. for Pub. Policy and Higher Educ., *Policy Alert: Education Pipeline Success Rate* (2004), *available at* http://www.highereducation.org/reports/pipeline/success.shtml. On the other hand, 92 of every 100 students in North Carolina attend public schools, N. C. Dep't of Admin., Div. of Non-Pub. Educ., *Non-public and Public School Enrollment Comparisons*, 2004-05, http://www.ncdnpe.org/hhh510p.htm, just as nine out of ten children in the United States attend public schools. Charles T. Clotfelter, *After Brown: The Rise and Retreat of School Desegregation*, 105 (Table 4.1) (2004).

The Court has long recognized that public elementary and secondary schools are "the very foundation of good citizenship," *Brown*, 347 U.S. at 493, and a "primary vehicle for transmitting the values on which our society rests." *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (citations omitted). Indeed, the inculcation of civic values is "truly the work of the schools." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (citations omitted).

Public school systems have an even greater interest in maintaining racial diversity than do colleges. Unlike selective institutions of higher education, local school systems must have robust parental and community approval to maintain the political and financial support they need to

survive. Broad multi-racial support for CMS rose when the community united behind a system of responsive, racially diverse schools; support among whites, African Americans, and other racial minorities has plummeted with the substantial racial resegregation that followed CMS's 2002 adoption of a post-unitary assignment system based on neighborhood schools.

Achieving and preserving racial diversity within a public school system enables school authorities to retain "legitimacy in the eyes of the citizenry" by showing that every school is serving "all segments of society," *Grutter*, 539 U.S. at 331-32. In particular, the choice of locally elected school boards to establish and maintain diverse elementary and secondary schools preserves public support for their community's public schools. This Court should reaffirm that school districts have a compelling interest in maintaining racially diverse schools.

A. The Desegregation of Charlotte's Schools Promoted Genuine Democratic Participation and Social Cohesion for Students and the Community

1. Pre-*Swann* Experience was Marked by Racially Isolated Schools. After the Court decided *Brown v. Board of Education* in 1954, the desegregation of Charlotte's public schools was neither willing nor expeditious. From 1957 to 1961, Charlotte City Schools grudgingly pursued "integration" by allowing annually no more than four African-American students—out of 18,000—to attend otherwise exclusively-white schools. Davison M. Douglas, *Reading, Writing and Race: The Desegregation of Public Schools*, 72-75, 81 (1995). No African-American student attended a Mecklenburg County school with white students until after the county and city schools merged in 1961. *Id.* at 75. From 1954 until 1969, moreover, school authorities placed most new schools deep within single-race

neighborhoods to facilitate "race-neutral" neighborhood pupil assignments that, as late as 1969, resulted in the assignment of 14,000 African American students (out of 24,000) to schools which were "all black or very nearly all black." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 300 F. Supp. 1358, 1360 (W.D.N.C. 1969).

Even though the affirmative duty of CMS to desegregate became clear in 1968, when *Green v. County School Board*, 391 U.S. 430 (1968), called on southern school boards to "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools," *id.* at 442, Charlotte schools remained effectively segregated by race—led by state and county political leaders who supported unlawful resistance, *see, e.g.*, Douglas, *supra*, at 153, 180, 203, and by tens of thousands of white Charlotteans who also opposed the federal district court's desegregation orders. *See, e.g.*, Douglas, *supra*, at 144, 174, 178. Despite four orders between April and November 1969 directing the school board to devise an acceptable plan to desegregate its schools,[2] the school board returned each time with either no plan or with a plan which failed to eliminate segregation. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 306 F. Supp. 1299, 1303 (W.D.N.C. 1969) (criticizing plan leaving 82 of 106 schools "readily identifiable" as either white or black schools).[3]

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[2] *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 300 F. Supp. 1358 (W.D.N.C. 1969); 300 F. Supp. 1381 (W.D.N.C. 1969); 306 F. Supp. 1291 (W.D.N.C. 1969); 306 F. Supp. 1299 (W.D.N.C. 1969).

[3] The school board also invariably crafted desegregation plans that egregiously put the desegregation burden on African-American students and communities by proposing mass closings of schools in African-American neighborhoods and one way busing of African-American students long distances to white schools surrounded by trailers to accommodate the resulting oversubscription. *Swann*, 328 F. Supp. 1346, 1347, 1350-51 (W.D.N.C. 1971); *see also, Swann*, 306 F. Supp. at 1303-04 (deeming approved "interim plan" an "affront to the dignity and pride

A fifth district court Order, issued in February 1970, was unanimously upheld by this Court's decisive opinion in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). Chief Justice Warren Burger approved a broad plan to desegregate the system's schools using district wide busing that paired many opposite race schools. *Id.* at 29-32.

Under the district court's plan, CMS became "the most fully desegregated urban school system in the nation's history," as half of the district's enrollment—20,000 more riders than in 1969—rode buses to school in 1970-71. Douglas, *supra*, at 203-04. One year earlier, 14,086 African-American students attended schools that were 99-100% African-American schools and the racial isolation was similar for white students. *Swann*, 300 F. Supp. at 1368. In 1970-71, *no* African-American student was assigned to a majority African-American school, and white students were also less isolated. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 311 F. Supp. 265, 271 (W.D.N.C. 1970) (showing 6 of 10 high schools were 80-100% white in 1969, compared to only 3 of 10 in 1970).

2. Racial Integration Stimulated Healthy Democratic Participation That Led To Far Greater Parental and Community Support for Schools. CMS parents experienced monumental changes as a result of the student reassignments that reconstituted their children's schools. *See Swann*, 311 F. Supp at 271-79 (charting, per school, the substantial changes, by race, that were initiated in

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of the black citizens" and prohibiting future plans from placing "burden of desegregation primarily upon one race"); *see also* Stephen S. Smith, *Boom for Whom: Education, Desegregation, and Development in Charlotte*, 70 (2004) (discussing absence of clear support of majority of African American community until after 1971 desegregation plan lessened inequities in busing plan).

107 CMS schools between Fall 1969 and Fall 1970).[4] Over time, the thousands of parents who involved themselves in their children's new schools emerged as a perhaps unanticipated force in CMS affairs.[5] Schools benefited from the advocacy of integrated PTAs, *see, e.g.,* Gaillard, *supra* n.5 at 121-24; Smith, *supra,* n.3 at 76, and grassroots advocacy—much of it bi-racial—helped tilt school board policies toward more equitable outcomes for African American and less affluent white students. Gaillard, *supra*, at 135; Douglas, *supra*, at 240. School officials came to rely on increasingly sophisticated community input regarding the administration of CMS schools. *See* Douglas, *supra*, at 235-36, 240-41; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 379 F. Supp. 1102, 1103-04 (W.D.N.C. 1974) (ratifying a long term desegregation plan and suggesting the district resolve future problems "with input as needed from ... community 'ombudsmen'").

Increased parental and civic involvement in CMS schools coincided with changes in voting patterns affecting the nine-member CMS school board. Whereas in the spring primary of 1970, the electorate had appeared immovably opposed to significant desegregation measures—installing three anti-busing candidates to fill three school board vacancies—just two years later, it reversed its 1970 votes to

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[4] By most accounts, Charlotte-Mecklenburg's acceptance of busing was "remarkably peaceful." A call to boycott the schools failed to materialize, the defection to private schools was "much smaller" than in other urban districts adopting similar busing plans, and bomb threats, while made, were thankfully never carried out. Douglas, *supra*, at 204-05.

[5] In 1970 alone, 4000 parents volunteered in CMS schools, "wherever they were needed—mothers and fathers unloading new furniture or cleaning up playgrounds, stacking new books on the library shelves" and "every year, the ranks of the volunteers grew larger" while "many of those parents, though apprehensive initially, were not at all disappointed with what the schools had to offer." Frye Gaillard, *The Dream Long Deferred* 121 (2nd ed. 1999.

defeat three anti-busing candidates in favor of moderates willing to work out a better desegregation plan. Gaillard, *supra*, at 83; Douglas, *supra*, at 224. After three more moderates were elected in 1974, a new board majority was able to settle on a long term student assignment plan that was accepted both by the *Swann* plaintiffs and the district court. Douglas, *supra*, at 224; *Swann*, 379 F. Supp. at 1103 (welcoming adoption of new assignment plan "as a clean break with the essentially 'reluctant' attitude which dominated Board actions for many years").[6] After 1970, no anti-busing candidate was elected to the school board for the next eighteen years. Smith, *supra*, at 68.

Other changes in voting patterns occurred as Charlotte-Mecklenburg's mostly white electorate began to cast winning votes—all races were at-large—for African-American candidates for the school board.[7] Before 1972, no African American had ever been elected to serve on either the previous city or county school boards, or the consolidated Charlotte-Mecklenburg School Board. Douglas, *supra*, at 224. However, beginning in 1972, African Americans henceforth were elected to serve on every school board. Smith, *supra*, at 71. Finally, school board policies began to change as white business interests, initially seeking only to temper anti-busing hardliners, Gaillard, *supra*, at 126, ultimately became a major source of support for an integrated school system. Smith, *supra*, at 69.[8]

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[6] CMS followed this plan until the 1991-95 administration of Dr. John Murphy, who introduced a vast system of magnets to replace most busing. Smith, *supra*, at 113.

[7] CMS school board races were at-large until single-member district representation was enacted in 1995. Smith, *supra*, at 24, 182; *Swann*, 300 F. Supp. at 1364.

[8] Hugh L. McColl Jr., CEO and chairman of the Charlotte-based Bank of America, has reflected on Charlotte's previous three decades:

> I believe public school desegregation was the single most important step we've taken this century to help our children. Almost immediately after we integrated

To the degree that desegregation in Charlotte-Mecklenburg provided a new context for increased racial, social and political cohesion, this cohesion likely would not have materialized if integrated schools had failed to serve the educational needs of CMS students. However, the evidence shows that CMS students benefited both academically and socially from racially diverse schools. After desegregation the performance of both African-American and white students improved, with African-American students experiencing the most dramatic progress.[9] In particular, the academic gains made by African-American students vindicated the widespread belief—expressed by over 80% of African American parents in a 1974 poll of CMS parents—that integrated schools offered African American students superior educational opportunities. Douglas, *supra,* at 156.

3. Racial Integration and Diverse Learning Environments Exposed All CMS Students to Important New Ideas and Experiences. In *Swann,* the Court expressly assumed that local school boards, exercising local control, might constitutionally choose to pursue racial diversity for its compelling benefits, absent any remedial justification. *Swann,* 402 U.S. at 16 (observing that school authorities

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> our schools, the Southern economy took off like a wildfire in the wind. I believe integration made the difference. Integration—and the diversity it began to nourish—became a source of economic, cultural and community strength.

Smith, *supra,* at 1.

[9] For example, between 1978 and 1986, math and reading scores for African-American third graders increased from the 20th percentile to the 48th percentile on nationally-normed tests, scores for African-American sixth graders increased from the 22nd to the 50th percentile (reaching the national average), and scores for African-American 9th graders jumped from the 20th to the 46th percentile. Gaillard, *supra,* at 186; *see also,* Smith, *supra,* at 78 (reporting "steadily increasing test scores and the narrowing of the black/white gap" in early 1980s).

"might well conclude ... that in order to prepare students to live in a pluralistic society," schools should be racially diverse). Such educational policies can plausibly be seen to increase racial tolerance, decrease resort to racial stereotypes, and prepare students to live and work together in an increasingly diverse world. *Grutter*, 539 U.S. at 329-33.

These insights are confirmed by former CMS students whose racially diverse schooling experiences were collected in interviews on file at the Southern Historical Collection at the University of North Carolina at Chapel Hill. These interviews share deeply personal reflections of students who experienced integrated education under *Swann*. They include Ned Irons, who graduated from West Charlotte High School in 1990 expressing gratitude that he, a white person, was "able to be around people who can verbally express what racism is like. Like what being black in America is like, ...instead of ...the preconceived notions that we all have."[10]

John Love, an African-American man who graduated from West Charlotte in 1980, gained "a more realistic sense of how the world works outside of my own community," including "how to deal with a variety of different people."[11] For John, the "lessons were pretty huge," as he came to understand "the importance of ... remaining true to my ideals" and of "being brave and challenging the things that need to be challenged or need to be thought about."[12]

May Johnson, a white woman who graduated in 1980, participated in student theater with African American

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[10] Interview with Ned Irons by Pamela Grundy, in the Southern Oral History Program Collection (#4007), Southern Historical Collection, Wilson Library, University of North Carolina at Chapel Hill (K-170) (Mar. 26, 1999).

[11] Interview with John W. Love, Jr. by Pamela Grundy, in the Southern Oral History Program Collection (#4007), Southern Historical Collection, Wilson Library, University of North Carolina at Chapel Hill. (K-172) (Feb. 17, 1999).

[12] *Id.*

and white students.[13] May and her friends "were interested in the same stuff and would get to be close when we do things in the theater, put on plays and stuff like that. You get to be close."[14]

William Hamlin was one of the first African-American students to integrate a white school.[15] Before integration, William's conversations with his friends "basically centered around the fact that we were just as good as any other students at Charlotte-Mecklenburg if we were given the opportunity to compete."[16] After integration, Hamlin saw people in the white community take steps to help desegregation work.

> [I]n the later 70's things began to start mellowing out. There was an initiative throughout the whole community that, 'We want to make this situation work.' In talking with children of affluent parents, at the time, their parents really made a sacrifice. They said, 'Look. If I'm going to be a leader in Charlotte-Mecklenburg, I'm going to lead not only in the white community but I'm going to lead on social issues. And they derived in a way mechanisms by which their children would be bused just like any other kid and they were going to be going to those schools. And, I think that's when it began to turn a corner.

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[13] Interview with May McNich Johnson by Matt West, in the Southern Oral History Program Collection (#4007), Southern Historical Collection, Wilson Library, University of North Carolina at Chapel Hill (K-462) (Apr. 29, 2001).

[14] *Id.*

[15] Interview with William Hamlin by Pamela Grundy, in the Southern Oral History Program Collection (#4007), Southern Historical Collection, Wilson Library, University of North Carolina at Chapel Hill (K-169) (Mar. 29, 1998).

[16] *Id.*

> I really did get a wellspring of pride to see what was going on....Viewed from the black community seeing it inching itself back to a point that now is being accepted in the community in general. That was a really good feeling.[17]

Latrelle McAllister, a 1976 African-American graduate of West Charlotte, believed integration was "an excellent growth experience," as she was "exposed to ... people from different neighborhoods or different socioeconomic status."[18] Latrelle, who later became a human resources director at a local college, saw through her experiences at West Charlotte that racial diversity is "very important in building, not only appreciation for people's differences, but tolerance for those differences. ... [A] lot of problems ... exist ... because people haven't developed tolerance or appreciation for ... differences."[19]

In the twelfth grade in 1976, Latrelle was likely a contemporary of James Swann, the six-year old for whom his father in 1965 had sought admission to an integrated school. Latrelle, and the other students in these interviews, ultimately did experience the educational environment sought by Darius Swann:

> We believe that an integrated school will best prepare young people for responsibility in an integrated society. Having lived practically all of his life in India, James has never known the meaning of racial

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[17] *Id.*

[18] Interview with Latrelle P. McAllister by Pamela Grundy, in the Southern Oral History Program Collection (#4007), Southern Historical Collection, Wilson Library, University of North Carolina at Chapel Hill (K-173) (June 25, 1998).

[19] *Id.*

> segregation. We have been happy to watch him grow and develop with an unaffected openness to people of all races and backgrounds and we feel it our duty as parents to ensure this healthy development continue.

Douglas, *supra*, at 107; Gaillard, *supra*, at 52 (citing 1964 letter to the CMS School Board from Darius Swann, a Presbyterian missionary whose family had recently returned to the United States).

These students' perceptions are confirmed by a recent comprehensive study comprised of nearly 550 interviews with 500 students who graduated from six integrated high schools around the country. *See*, Amy S. Wells, et al., *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society* 2, 9 (Mar. 30, 2004) *available at* http://cms.tc.columbia.edu/i/a/782_ASWells 041504.pdf. West Charlotte High School was one of the schools included in the study. *Id.* at 11. The study found that, regardless of racial and ethnic background, all of the high school graduates interviewed were grateful that they attended racially diverse high schools. "They said these schools provided them with one of their only opportunities – or their only opportunity – to mix with people of other racial or ethnic backgrounds. ... [T]his experience yielded a valuable social education not otherwise available through books, videos, or field trips..." *Id.*, at 16.

Amici speak now for school authorities, communities and parents who wish for their students this same ability "to develop ... an unaffected openness to people of all races and backgrounds." School boards should be allowed to create diverse schools as a matter of sound educational policy and to take into account the race of students in making school assignments to the extent necessary to achieve that goal.

4. Resegregation Has Sharply Eroded Public Support for Public Education. In 1997, a successful legal challenge to CMS's continued federal judicial supervision began with an equal protection claim challenging CMS's magnet school admissions policy that aimed for an enrollment of 40% African American students and 60% students of other races. *See Capacchione v. Charlotte-Mecklenburg Sch.*, 57 F.Supp.2d 228, 239, 287 (W.D.N.C. 1999), *aff'd in part, rev'd in part sub nom. Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305 (4th Cir. 2001) (*en banc*), *cert. denied*, 535 U.S. 986 (2002). Introduced by CMS Superintendent John Murphy in 1992, the program converted 58 of the district's 126 schools to magnet schools and eliminated most busing (especially for white students), all on assurances from Dr. Murphy that these measures would maintain racial diversity and significantly improve academic outcomes. *Id.* at 321, 339; Stephen S. Smith and Roslyn A. Mickelson, *All That Glitters Is Not Gold: School Reform in Charlotte-Mecklenburg*, 22 Educ. Evaluation & Pol'y Analysis, 101, 107-08, 117 (2000). Failing to meet *either* objective, the program instead generated the highest levels of public anxiety CMS had experienced since 1970. *Id.* at 107-08, 117 (showing that, except in some higher level high school courses, the magnet program did not improve SAT scores, dropout rates, or proficiency in core high school subjects, and outcomes in grades 3-8 reading and math declined).

Public criticism of the program focused on its destabilizing effects, as magnet schools drained resources, active PTA members and high performing students from the non-magnet African-American schools, and exacerbated the increasing number of non-magnet schools that, without busing, were becoming racially imbalanced. Smith, *supra*, at 98-100, 119, 163; *see also* Douglas, *supra*, at 206-21. By 1995, widespread public dissatisfaction prompted voters, for the first time since before desegregation, to defeat a comprehensive school bond referendum and elect a school

board so aligned against Murphy that he departed office the day before CMS's new school board was sworn in.[20] Smith and Mickelson, *supra*, at 102.

Public support for CMS began to collapse in the 1990s when resegregation pitted school against school and communities against communities. This gulf worsened significantly after 2002, when CMS—compelled to abandon its desegregation plan by a "unitary status" decree from the federal courts—adopted instead a new plan promising most students the opportunity to attend "neighborhood schools" with magnet school options. Roslyn A. Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from Charlotte Mecklenburg Schools,* 81 N.C.L.Rev. 1513, 1522 (2003). Because of the widespread residential segregation throughout Mecklenburg County, 48% of all African-American students soon found themselves in racially identifiable African-American schools. *Id.* at 1558; *see also*, Ken Godwin, et al., *Sinking Swann: The Resegregation of Charlotte Schools*, 23 Rev. of Pol'y Res. 983, 990 (2006) (stating that the "most obvious outcome of the policy change to mandatory choice was the increase in the number of segregated schools in the district"). CMS was forced, moreover, to remove any promise of "choice" and transfers when white families overwhelmingly chose schools in their largely segregated white neighborhoods, resulting in such overcrowding that these predominantly white, middle- and upper-middle class schools quickly became effectively closed to non-white students who lived outside these privileged neighborhoods. *See id.* As a result, African-American families, who disproportionately sought transfers for their children,

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[20] Smith & Mickelson, *supra*, at 102; see also, Smith, *supra*, at 121, 125 (reporting that in September 1995—before school board elections in November but after the May 1995 rejection of the bond referendum—Murphy announced that he would resign sometime "before the end of the 1995-96 academic year").

effectively lost access to high performing, majority white suburban schools. *Id.* at 990.

The option of neighborhood choice, combined with a perception that majority African American schools offer unequal educational opportunities—a perception corroborated by achievement data showing inferior academic outcomes in these schools[21]—motivated parents of students in majority white schools to stay put and demand that CMS prioritize new construction in the suburbs. *See, e.g.*, Ann D. Helms, *School Bonds Rejected First Time in Ten Years,* Charlotte Observer, Nov. 9, 2005, at A1 (quoting suburban parent seeking modified bond package to make "more happen in the north more quickly"). Parents of students in majority African-American schools, angry over the low performance in their students' schools, demanded by contrast that the school district focus its limited resources on their schools. Editorial, *Blacks Decry Inter-City Schools*, Charlotte Observer, Feb. 20, 2005, at 1B. In November 2005, united only by their anger, voters from Charlotte's segregated white suburbs and its segregated African American center city together defeated $427 million in school bonds because each group had come to distrust the

[21]Notwithstanding the district's contention that "the achievement gap has narrowed" since its return to neighborhood schools, *See, e.g.*, Charlotte-Mecklenburg Schools, End-of-Grade Tests: 2002-03 Results at 2 (http://www.cms.k12.nc.us/news/stories/EOG-TestResults%20.pdf) (last visited on Oct. 8, 2006) (focusing on general proficiency designations but not raw scores), a closer examination of achievement data reveals that racial gaps in the *raw scores* on end of year tests have actually widened. For example, in a study examining the impact on students of the change from CMS's race conscious assignment policy to its neighborhood schools policy, researchers at the University of North Carolina-Charlotte determined that the change led to a statistically significant and substantively meaningful drop in the *raw* math test scores of African American and Latino students and a statistically significant increase in test score gaps between whites and minorities. Godwin, et al., *supra*, at 990-94 (attributing increase in gaps to concentration of poverty in predominantly minority schools).

district's priorities. Helms, *supra.* Meanwhile, millions of dollars of reform efforts targeting academic performance in majority African American schools have failed to achieve the targeted results[22]

In the late 1980s, rapid growth in Charlotte's suburbs exerted increasing pressure on CMS to accept an increase in resegregation.[23] School authorities, backed by public support, resisted this pressure. They knew that the experience in Nashville, Memphis, and other similarly-sized cities was that "white flight *accelerated* with resegregation....and cities [allowing resegregation] could

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[22] In response to the legal challenge brought against CMS in the State's education adequacy litigation, CMS set targets for 2005-06 improvements on standardized test scores in its ten lowest performing high schools. The board of county commissioners had also appropriated a $4.9 million emergency "Challenge Grant" for improvement efforts in three of the four lowest performing schools—Garinger, West Charlotte and West Mecklenburg High Schools—all three racially isolated minority schools. *See* Letter from Hon. Howard E. Manning, Jr., Wake County Superior Court, to June St. Clair Atkinson, State Superintendent, North Carolina Department of Public Instruction and Howard N. Lee, Chairman, State Board of Education, March 3, 2006, *available at* http://www.ncforum.org/resources/hoke_county.html (reviewing CMS targets for low performing high schools). The three Challenge Grant schools did not come close to meeting their 2005-06 targets, Charlotte-Mecklenburg Schools, *High School Challenge Reform Executive Summary,* https://extranet.cms.k12.nc.us/news/stories/internetNews/pdf/9A28A200653810PM.pdf (last visited Oct. 6, 2006) (providing 2005-06 scores for Challenge Grant schools).

[23] These pressures—which prompted the Murphy-era changes and continue today to affect school policies—embody the very real challenges local authorities must have discretion to address. For example, the population of metropolitan Charlotte has nearly doubled since the 1980s, spawning both suburban expansion and school construction far from central city areas where most African-American families reside. As a result, school authorities face constant temptations to use the district's most integrated "middle ring" neighborhoods to enhance student diversity in the outer suburbs and inner city, thus penalizing the very neighborhoods that reflect the ideal of racially integrated neighborhoods. Smith, *supra,* at 24, 97, 119.

expect to pay a price." Gaillard, *supra,* at 188. Today, Charlotte is paying the price. Suburban white activists have begun to argue for "secession" from CMS, taking their cause as far as the State legislature, Staff Editorial, *Wrong Answer: Splitting from CMS Wouldn't Solve Overcrowding Problems*, Charlotte Observer, Feb. 20, 2005 at 2P; *see also*, Ann D. Helms, *Legislature Kills Bill on Break Up, Officials Hushed*, Charlotte Observer, Apr. 13, 2005 at A1, while private school use has *increased* with race-neutral student assignment. Peter Smolowitz and Ted Mellnik, *Private Schools On Rise: Analysis Shows Trend Among Better-Off Families in Mecklenburg*, Charlotte Observer, Sept. 8, 2006, at A1. White flight, the anguish of African American parents who desire better educational opportunities for their children, the failure of a comprehensive school bond, and the critical loss of intercommunity cooperation, all have contributed to CMS's current inability, after resegregation, to maintain robust community and parental support for Charlotte's system of public schools.

B. The Promise of *Swann*, that Local School Authorities Have Broad Discretion to Implement Educational Policies Designed to Prepare Students to Live in a Pluralistic Society, Should Not be Abandoned.

The Court in *Swann* drew a careful distinction between the powers of a federal court and the discretion of a local school board. *Swann,* 402 U.S. at 16. It is clear the distinction was not mere dicta, for in a companion case, the Court relied expressly upon this language as a basis for invalidating North Carolina's anti-busing statute. *N. C. State Bd. of Educ. v. Swann,* 402 U.S. 43, 45 (1971). Most significantly, in another case decided on the same day, the Court relied on this principle to find that a school board's voluntary student-assignment plan that took into account the

race of students in drawing attendance zones was not a violation of the Equal Protection Clause of the Fourteenth Amendment, nor a violation of Title IV of the Civil Rights Act of 1964. *McDaniel v. Barresi*, 402 U.S. 39, 41-42 (1971).

In later cases this key distinction was reaffirmed. For example, in *Keyes v. School District No. 1*, 413 U.S. 189, 242 (1973), Justice Powell wrote:

> In a pluralistic society such as ours, it is essential that no racial minority feel demeaned or discriminated against and that students of all races learn to play, work, and cooperate with one another in their common pursuits and endeavors. Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience.

Granting broad educational latitude to local school boards is consistent with the Court's repeated insistence that local control of educational policies is a fundamental value. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (citations omitted). *See also Freeman v. Pitts*, 503 U.S. 467, 506 (1992) (Scalia, J., concurring) (noting that "[w]e must soon revert to the ordinary principles of our law, of our democratic heritage, and of our educational tradition . . . that public schooling, even in the South, should be controlled by locally elected officials acting in conjunction with parents.").

School districts over the years have properly and judiciously relied on the principle announced in *Swann* and *McDaniel*, recognizing their considerable authority to take

race into account in order to promote racial diversity in student assignments. *See, e.g., Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 750-51 (2d Cir. 2000) (relying on *Swann*, the companion cases, and subsequent decisions to conclude that school districts may act voluntarily to counter *de facto* segregation and to seek the benefits of education in a racially integrated setting); *Willan v. Menomonee Falls Sch. Bd.*, 658 F.Supp. 1416, 1422 (E.D. Wisc. 1987) (relying upon "well-settled . . . federal law that state and local school authorities may voluntarily adopt plans to promote integration even in the absence of a specific finding of past discrimination."); *National Assn. for Neighborhood Schools, Inc. v. Board of Pub. Educ*, 497 F.Supp. 471, 477 (D. Pa. 1980) (upholding Pittsburg's student assignment plan on the well-defined principle of *Swann* and *McDaniel*, that school boards may voluntarily act to provide for integrated schools); *Moss v. Stamford Bd. of Educ.*, 356 F.Supp. 675, 686 (D. Conn. 1973) (same)

In the Fourth Circuit alone, "hundreds of [such voluntary] public student assignment plans, ... have been crafted carefully over the past thirty years by school boards and superintendents, with the input of thousands of interested parents and teachers, under the authority of leading Supreme Court decisions, federal executive guidelines, and state directives." John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C.L. Rev. 1719, 1721 (2000).

It is difficult to fathom a reliance interest greater than that of a local district which has pursued the use of a voluntary, race conscious desegregation plan. "[T]he classic case for weighing reliance heavily in favor of following the earlier rule" is where "advance planning of great precision is most obviously a necessity." *Casey v. Planned Parenthood*, 505 U.S. 833, 856 (1992). By definition, voluntary desegregation plans require vast investments of time, expertise and planning.

Perhaps most significantly, the Seattle School District was entitled to rely on this principle after the Court itself, in earlier litigation over the city's voluntary efforts to integrate their schools, recognized that "[a]ttending an ethnically diverse school may help accomplish this goal [of student success] by preparing minority children 'for citizenship in our pluralistic society,' while, we may hope, teaching members of the racial majority 'to live in harmony and mutual respect' with children of minority heritage." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 473 (1982) (citations omitted). In fact, in 1982 the Court expressly noted that Seattle's ability to adopt race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation, was a well-established principle. *Id.*, at 472 n.15 (citations omitted).

II. RACE-NEUTRAL ASSIGNMENT POLICIES CANNOT ACHIEVE THE BENEFITS OF DIVERSITY IN MANY SCHOOL DISTRICTS

The experience of public schools in Charlotte-Mecklenburg during the years since federal courts enjoined the further use of race in student assignment policies — a dismal record of rapid resegregation by race, sharp socioeconomic isolation by class, and troubling performance outcomes in lower-income African-American and Latino schools — is powerful evidence that CMS has not been able to employ race-neutral measures to achieve educationally successful, diverse educational settings. Although CMS uses a variety of methods generally touted as race-neutral solutions, such as magnet schools and special resources for underperforming schools, the school system has resegregated at an astonishing rate, with disastrous results for the ability of the school board to maintain public support for its schools.

A state court judge, reviewing statewide accountability scores in Charlotte's resegregated schools, has condemned the "academic genocide" he finds in many CMS high schools. *Hoke County Bd. of Ed., et al. v. State of North Carolina, et al*, 95 CVS 1158, Report from the Court: The High School Problem, 23, (Wake County Superior Court May 24, 2005) (stating "the most appropriate way to describe what is going on academically in CMS's bottom '8' high schools is academic genocide for the at-risk low income children"). The court cited "no overall progress" in black achievement in 2002, 2003, and 2004, with black students remaining constant at a 60% failure rate on state accountability tests, contrasted with white students remaining constant at a 23% failure rate. *Id.* at 21.

A. Race-Neutral Assignment Policies in Charlotte-Mecklenburg Have Resulted in Racially Isolated Schools

In the first year after the 2002 CMS plan was implemented, the number of Charlotte-Mecklenburg schools with minority enrollment of 91% to 100% more than doubled, John C. Boger, *Education's "Perfect Storm"? Racial Resegregation, High-Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C.L.Rev. 1375, 1395 (2003), and the district's number of racially imbalanced schools[24] jumped from 47 to 81 schools.[25] Two years later, in 2004-05, this number had

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[24] Defined as plus or minus 15% of the school district's black and white student populations for each year.

[25] Godwin, et al., *supra*, at 990 (discussing "results [which] show clearly that the change from the policy designed to encourage desegregation to the race-neutral policy led to substantially greater ethnic sorting"); *see also*, Mickelson, *supra*, at 1557 (showing elementary, middle and high schools in Charlotte declined by 19.4%, 8.8% and 14.7% respectively during the first year of the choice plan).

increased to 87 schools. Charlotte-Mecklenburg Schools, School Profiles, 2005-06, http://www.cms.k12.nc.us/allschools/allschools.asp (last visited Sept. 1, 2006) (providing enrollment data on 150 CMS schools).

The CMS system has failed to ensure equality in its racially resegregated black schools, despite implementing precisely the sorts of interventions that various *amici* for Petitioners champion as race-neutral ways to improve student achievement. *See, e.g.*, Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, No. 05-908, 23, 25-26 (filed Aug. 2006). Race-neutral interventions, of course, do not ensure that school districts can provide students with the benefits of racially integrated school environments, since experience shows they lead to racially separate schools. Compounding that shortcoming, Charlotte's experience with race-neutral policies that ostensibly drive greater resources to predominantly minority schools is that students at even the resource-favored, but racially segregated, schools continued to experience troubling, unremedied achievement gaps. The prospects for separate-but-equal in 2006 are no more promising than they were in 1896.

B. Student Achievement Does Not Improve in Racially Isolated Schools

Charlotte's former superintendent, Dr. John Murphy, has suggested to the Court that, during his tenure with CMS, he was able to dramatically improve student performance "without resort to racial balancing." Brief of *Amici Curiae* Drs. Murphy, Rossell and Walberg in Support of Petitioners, *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, No. 05-908, 10 (filed Aug. 2006). He is mistaken. Dr. Murphy's reform program for CMS "had the worst of both worlds: Its success in improving Black academic

achievement was minimal and the racial imbalance within CMS increased." Smith and Michelson, *supra*, at 121. Indeed, Dr. Murphy's own associate superintendents reported to him a year before his resignation that in comparison to other urban districts in North Carolina, including Durham, Guilford Co.[Greensboro], Wake Co. [Raleigh], and Winston-Salem/Forsyth, on the 1994 State Report Card reporting standardized test results, CMS's overall performance was well below the average, and that the district's improvement rate from 1993 to 1994 was generally lower than that of other cluster districts. Smith, *supra*, at 144.

The further experience in Charlotte since the *Belk* decision in 2001 shows that the district continues to fail to meet its goals with regard to reducing the achievement gap between white and black students. In March 1999, CMS adopted a strategic plan it called *Achieving the CMS Vision: Equity and Student Success*, in which it set out "CMS Goals 2005" that included "eliminating the achievement gap in performance among White, African-American and Hispanic/Latino students" so that by 2005, performance gaps were "to be no more than ten percentage points." Charlotte-Mecklenburg Schools, Status Report, January 2003, http://www.cms.k12.nc.us/discover/goalsequityScorecard/ntroduction.pdf. (last visited Oct. 8, 2006). However, every "Equity Scorecard" subsequently released has reported multiple instances of targets "not met" in reducing achievement gaps between white students and students of color. *See*, Charlotte-Mecklenburg Schools, Equity Scorecards: Student Achievement/Disparity, 2003, 2004, and 2005 http://www.cms.k12.nc.us/discover/goals/balancedScorecard.asp (last visited Oct. 8, 2006). Moreover, in Spring 2005, the performance gap between white and African American high schoolers on end of year tests was 33.5 percentage points and between white and Hispanic high schoolers it was 27.2 percentage points, and the performance

gap among 3rd-8th graders in reading was 18.3 percent points between white and African American students, and 19.5 percentage points between white and Hispanic students. Charlotte-Mecklenburg Schools, *School Performance: School Year 2005-06 Results* http://www.cms.k12.nc.us/departments/instrAccountability/schoolPerformance.asp (last visited Oct. 8, 2006). Overall, the return to racially segregated schools has not met CMS' own expectations of narrowing the achievement gaps between white, black and Hispanic students. Godwin, et al., *supra,* at 994.

Thus, the Seattle and Jefferson County school districts are fully justified in concluding that race-neutral alternatives will not achieve the compelling governmental interest they have in providing educationally effective and racially integrated learning environments for students. Indeed, the Charlotte-Mecklenburg experience since 1966 provides a cautionary tale and a well-studied example of the negative consequences in school districts that ignore the connections between racial integration, public support for schools and quality educational opportunities for all students.

CONCLUSION

The judgments of the Court of Appeals in both cases should be affirmed.

Respectfully submitted,

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